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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON**

JESSE REYES, DANIEL REYNOSO,
LEAGUE OF UNITED LATIN
AMERICAN CITIZENS, LATINO
COMMUNITY FUND OF WASHINGTON,

Plaintiffs,

vs.

BRENDA CHILTON, *et al.*,

Defendants.

Case No.: 4:21-cv-05075-MKD

**PLAINTIFFS' RESPONSE IN
OPPOSITION TO DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT**

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I. INTRODUCTION

Defendants Benton County, Chelan County, and Yakima County's (collectively "Defendant Counties") implementation of Washington's signature verification requirement has the effect of racial discrimination in violation of Section 2 of the Voting Rights Act. Additionally, Defendant Counties apply the signature verification requirement in a manner that is both devoid of procedural due process and intentionally racially discriminatory. The record here demonstrates genuine issues of material fact regarding all of Plaintiffs' claims. Consequently, the Court should deny Defendants' Motion for Summary Judgment.

II. BACKGROUND

Plaintiffs' Statement of Disputed Material Facts provide relevant facts in detail, which show that genuine issues of material fact exist. Defendant Counties must follow certain provisions of Washington's Revised Code and Washington Administrative Code to verify signatures by voters on their ballot envelopes. *See* RCW §29A.40.110(3); WAC 434-379-020. All final decisions on whether to accept or reject a ballot that was flagged for "signature mismatch" are made by the Canvassing Review Board ("CRB") of each county. WAC 434-262-015. Yet, election staff and CRB members are not adequately trained to verify voters' signatures. *See* Waknin Decl., Ex. A at 5-8 (Benton County Resp.), at 5-7 (Chelan County Resp.), at 5-7 (Yakima County Resp.); Ex. B at 60:5-64:11, 77:15-79:18); Ex. C at 78:2-8; 87:7-12; Ex. D at 38:9-55:10. None of the Defendant Counties mandate their CRB members receive signature verification training. *See id.*, Ex. E. It is undisputed that CRB members can identify the race of Spanish surname signatures. Extensive research findings in social psychology, political science, sociology, and economics demonstrate how people correlate race with name and how bias is a factor in signature evaluations. ECF No. 79-2 at ¶¶ 16-20. Furthermore, it is undisputed that Latino citizens suffer from higher rates of rejection

1 in these counties. A recent performance audit by the State of Washington confirmed
2 that ballots of Latino voters are rejected at a statistically significant higher rate than
3 those of white voters. *Id.*, Ex. F at 19.

4 After a ballot is flagged for signature mismatch, voters are mailed cure notices.
5 RCW §29A.60.165(2)(a). Only Yakima County is required to provide notices and cure
6 information in Spanish. *U.S. of Am. v. Yakima Cnty.*, CV-04-3072-LRS (E.D. Wash.
7 2004). If a voter submits a cure notice, they can still have their ballot rejected if the
8 CRB believes that the cure signatures does not match the ballot declaration signature.
9 *See* Waknin Decl., Ex. G at ¶¶ 2-3; Ex. H at ¶ 2.

10 Latino voters bear the burden of Defendant Counties' application of the
11 signature verification regime. ECF No. 79-1 at ¶¶ 25-28. The fact that voters with
12 Spanish and non-Spanish surnames voted their ballots too late at similar rates is strong
13 evidence that the disparity of signature rejection is not due to Latino voters being less
14 knowledgeable about the vote-by-mail process. *Id.* at ¶¶ 31-35. Defendant Counties
15 have been aware that there is a racial disparity in signature mismatch rejections
16 between Latino and non-Latino voters. *See* Waknin Decl., Ex. I at 132:21-145:7.

17 III. LEGAL STANDARD

18 Summary judgment is proper when a moving party has demonstrated "that there
19 is no genuine dispute as to any material fact and the movant is entitled to judgment as a
20 matter of law." Fed. R. Civ. P. 56(a). "The court views all underlying facts in the light
21 most favorable to the non-moving party." *U.S. v. Blaine Cnty.*, 157 F. Supp.2d 1145,
22 1148 (D. Mont. 2001) (citing *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1378
23 (9th Cir. 1998)).

24 Summary judgment is generally not appropriate in cases concerning voting
25 rights "due to the fact-driven nature of the legal tests required by the Supreme Court."
26 *Ga. State Conf. of NAACP v. Fayette Cnty. Bd. of Comm'rs*, 775 F.3d 1336, 1348 (11th

1 Cir. 2015); *see also One Wis. Inst., Inc. v. Nichol*, 186 F. Supp.3d 958, 968-70 (W.D.
2 Wis. 2016).

3 IV. ARGUMENT

4 There are genuine disputes as to the material facts in this matter precluding
5 summary judgment. All of Plaintiffs' claims are fact-intensive and require a fact
6 intensive inquiry by this Court at trial.¹

7 A. Plaintiffs' Section 2 Effects and/or Results Claim Under the VRA 8 Presents a Triable Issue of Fact

9 Defendants Counties' application of the signature verification process violates
10 Section 2 of the VRA and has the effect of racial discrimination against Latino voters.
11 Pursuant to Section 2, the question this Court must answer is whether a "certain
12 electoral law, practice, or structure interacts with social and historical conditions to
13 cause an inequality in the opportunities enjoyed by [minority voters] and white voters
14 to elect their preferred representatives." *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986).
15 Since this case was filed, the Supreme Court issued its opinion in *Brnovich v.*
16 *Democratic Nat'l Comm.*, 141 S.Ct. 2321 (2021), which set several "guideposts" for
17 this Court to consider, in addition to certain factors outlined in *Gingles*.

18 1. Plaintiffs Have Demonstrated Genuine Issues of Fact Under the 19 *Brnovich* Guideposts

20 There is a genuine issue of fact under the *Brnovich* guideposts that forecloses a
21 finding of summary judgment. In *Brnovich*, the Supreme Court set out five non-

22
23 ¹ Defendants mischaracterize Plaintiffs' requested relief. Plaintiffs are asking the Court
24 to require Defendant Counties to implement easily applied remedies to prevent racial
25 discrimination in the signature verification process. Plaintiffs do not, as Defendants
26 suggest, ask this court to invalidate the entire signature verification process. *See* ECF
27 No. 49 at VI, 3a-3p.

1 exhaustive guideposts that a court may consider when determining whether there has
2 been a Section 2 violation. These guideposts include: (1) the size of the burden
3 imposed by a challenged voting rule; (2) the degree to which a voting rule departs
4 from what was standard practice when § 2 was amended in 1982; (3) the size of any
5 disparities in a rule's impact on members of different racial or ethnic groups; (4)
6 opportunities provided by a State's entire system of voting; and (5) the strength of the
7 state interest served by a challenged voting rule. *See Brnovich*, 141 S.Ct. at 2336-40.
8 Plaintiffs do not have to satisfy each of the *Brnovich* "guideposts" to defeat summary
9 judgment; Plaintiffs simply must come forward with some evidence supporting some
10 of them. *See Fla. State Conf. of NAACP v. Lee*, 576 F. Supp.3d 974, 984-85 (N.D. Fla.
11 2021) (finding that plaintiffs' evidence of socioeconomic disparities between minority
12 voters and majority voters, higher costs associated with voting for minority voters,
13 and reduced opportunities for a minority voter to return a ballot were sufficient to
14 defeat defendants' motion for summary judgment under *Brnovich*).

15 **Guidepost One: Size of the Burden**

16 The record contains evidence showing a disputed issue of material fact
17 regarding the size of the burden imposed on Latino voters in Defendant counties.
18 *Brnovich* asks the court to consider the size of burden in weighing the impact of
19 voting practice. Constitutional concerns are heightened when a plaintiff raises a claim
20 that the burden of a voting law falls disproportionately on a discrete group of voters.
21 *See Ariz. Democratic Party v. Hobbs*, 18 F.4th 1179, 1190 (9th Cir. 2021). Here,
22 Plaintiffs challenge the *application* of the signature verification requirement by
23 Defendant Counties that disproportionately affects a discrete group of voters—
24 Latinos. There is ample evidence of the burdens imposed on Plaintiffs and on Latino
25 voters as a group and individually. Latino voters disproportionately have their ballots
26 rejected by the CRB for apparent signature mismatch in Defendant Counties

1 compared to their Anglo counterparts. ECF No. 79-1 at ¶¶5-7. Voters with Hispanic
2 sounding first names and surnames are three- to four-and-a-half times more likely than
3 Anglo voters to have their ballots rejected. *Id.* at ¶¶ 7; 27-29.

4 There are also specific and individual burdens that Latino voters face through
5 the application of the signature verification process. *See* ECF No. 123-34 at 37:5-21.
6 Defendant Counties cite no evidence that non-Latino voters face the same level of
7 burdens in these regards. Additionally, Defendant Counties' failure to provide curing
8 information in other languages further burdens individual Latino voters. *See* Waknin
9 Decl., Ex. K. Even when Latino voters attempted to cure their ballots, they are denied
10 the ability to have their vote count because their cure signatures are rejected by the
11 CRB. *See id.*, Ex. H at ¶ 2 ("After I cast[] my ballot for the November 2017 election, I
12 was informed that the Yakima County Elections Office flagged my ballot as having a
13 mismatched signature. I returned the cure form to update my registration signature.
14 Yet I learned that my vote continued to be denied by the Canvassing Review Board.");
15 *see also* Ex. G at ¶¶ 2-3 ("I filled out the cure form and signed my name and my aunt
16 delivered my cure form to the Yakima County Elections Office. On or around
17 November 15th, 2017, I learned that my signature was still rejected, and my vote
18 would not count."). Voters lose confidence in the electoral system once their ballots
19 are rejected: a voter is three times less likely to vote in the next election after a
20 signature mismatch rejection. ECF No. 49 at ¶ 147. Accordingly, the size of burden
21 and its effects each grows exponentially every time a Latino voter's ballot is rejected
22 for a mismatched signature. In conclusion, Latino voters' undue burden is
23 demonstrated by racial disparity data, language access, lack of alternative means of
24 voting, and unsuccessful attempts to cure confounded by socio-economic barriers that
25 already impede Latino voter turn-out.

26 **Guidepost Two: Departure from Voting Rules in 1982**

27
28 PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT

1 There is a disputed issue of material fact whether Washington’s signature
2 verification regime, as it stands today, existed in 1982. *Brnovich* asks whether the
3 voting practice at issue departs from what was standard practice when the Voting
4 Rights Act was amended in 1982. *Brnovich*, 141 S.Ct. at 2338. Such a determination
5 based upon the record is inappropriate for summary judgment.

6 Widespread signature verification for statewide vote-by-mail ballot elections
7 was not contemplated in 1982 in Washington State. Thus, the current signature
8 verification process through the CRB in Defendant Counties departs from the voting
9 rules in place in 1982. “[I]n 1982 States typically required nearly all voters to cast
10 their ballots in person on election day...” *Brnovich*, 141 S.Ct. at 2339. Before 1983,
11 Washington did not have “no excuse” absentee voting. Waknin Decl., Ex. L. Now, the
12 state essentially requires *everyone* to vote by mail, a policy enacted in 2011.² *Id.*

13 The voting rule at issue in this case, specifically the application of signature
14 verification by the CRB, was enacted between 2003 and 2005. *See* WAC 434-379-
15 020. Washington implemented the current entirely vote by mail elections system
16 between 2005 and 2011. *See* Waknin Decl., Ex. L. Because nearly every voter must
17 vote by mail now, these new rules affect nearly every ballot case in an election.
18 Neither the composition of County CRBs nor the signature verification standard at
19 issue can be considered extensions of the limited absentee voting system that was in
20 place in 1982. *See e.g., Fair Fight Action, Inc. v. Raffensperger*, 593 F. Supp.3d 1320,
21 1338 (N.D. Ga. 2021) (finding that Georgia’s law requiring county registrars to
22 compare voters’ information to a separate database maintained by a different state or
23 federal agency was not an extension of a preexisting voting requirement that
24 applicants registering to vote provide election registrars with “proper identification
25 _____

26 ² Before 2005, vote by mail was not a permanent option in the State, (Waknin Decl.,
27 Ex. K), and thousands of voters still went to the polls in-person. *See id.*, Ex. M.

1 and information” to identify themselves and weighed against Defendants’ motion for
2 summary judgment). It cannot be inferred that the application of the signature
3 verification policy fails to violate Section 2 of the federal Voting Rights Act, making
4 summary judgment inappropriate.

5 **Guidepost Three: Size of Disparity**

6 The record in this case demonstrates a genuine issue of material fact on the
7 disparate impact of the application of signature verification. *Brnovich* states that the
8 disparate impact on minorities must be large enough to constitute a §2 violation.
9 *Brnovich*, 141 S.Ct. at 2346. The record demonstrates that the application of the
10 signature verification requirement by Defendant Counties disproportionately affects
11 minority voters: Latino voter ballots account for 9% of total ballots cast, but account
12 for over 20% of all ballots rejected for signature mismatch. ECF No. 79-1 at ¶ 7.
13 Ballots with Latino surnames were on average rejected anywhere from 3-4 times
14 higher than their non-Latino counterparts. *See* ECF No. 79-1 at ¶¶ 25-29. That
15 rejection rate increased to 3.3-4.5 times higher for voters with both a Spanish first
16 name and surname. *Id.* at ¶ 27. While Defendants argue that the percentage of Latino
17 surname ballots rejected due to signature mismatch is statistically small, the number of
18 ballots rejected can determine local elections in these counties. ECF No. 79-1 at ¶¶ 36-
19 37.

20 Even if only a handful of Latino voters’ ballots were rejected, the impact is
21 consequential and the burden substantial. In the 2019 City of Sunnyside Council race,
22 the winning candidate won by a margin of one vote. *Id.* at ¶ 37. In that election, six
23 ballots were rejected for signature mismatch, with four of those ballots belonging to
24 voters with Spanish surnames. Waknin Decl., Ex. N. *See Fair Fight Action*, 593 F.
25 Supp.3d at 1339-40 (finding a policy that affected only 4% of voters could have a
26 disparate impact on voters such that evidence that 0.19% of white non-Hispanics being
27

1 in MIDR status, while 2% of Black voters, 1.5% of Hispanic voters, and 1.19% of
2 Asian or Pacific Islander voters in the same status was enough evidence to create a
3 genuine issue of material fact). The size of the disparity is statistically significant
4 because it can determine an electoral race. Thus, summary judgment is inappropriate
5 for this additional reason.

6 **Guidepost Four: Meaningful Alternatives to Voting**

7 Washington does not provide other meaningful and easily available methods to
8 vote by mail. Under *Brnovich*, Courts have to consider all available means for voting
9 when evaluating burdens placed on voters. *Brnovich*, 141 S.Ct. at 2339. There is no
10 robust in-person voting in Washington: collectively, Benton County, Chelan County,
11 and Yakima County operated a total of only five in-person voting centers total during
12 the 2022 General Election. Waknin Decl., Ex. O. None of the Defendant Counties
13 provide information on in-person voting opportunities. Benton County in particular
14 states in their “How to Vote” tutorial that “In Benton County, all voting is done by
15 mail.” Benton County Auditor, *How to Vote - Benton County WA*, YouTube (2022),
16 <https://www.youtube.com/watch?v=b1BJpqqC1I>. Whether there are ways to
17 meaningfully cast a ballot other than by mail (there are not) is a material factual
18 dispute.

19 **Guidepost Five: State’s Interest in Challenged Procedure**

20 The record contains a material issue of fact regarding the state’s interest in the
21 challenged procedure here. The last *Brnovich* factor considers a state’s interest in the
22 challenged voting policy, which Defendants assert is preventing voter fraud. While
23 preventing voter fraud is a legitimate interest, “[a] state cannot simply cite fraud as a
24 state interest for every voting rule without showing that rule prevents fraud or
25 otherwise legitimately furthers that state interest.” *Fair Fight Action, Inc.*, 593 F.
26 Supp.3d at 1341. The record demonstrates that CRB members are not required to be
27

1 trained in signature verification and in many circumstances have not been trained to
2 review signatures. Waknin Decl., Ex. I at 57:14-25, 59:1-7; Ex. A at 5-7 (Chelan
3 County Resp.); Ex. B 60:5-64:11, 77:15-79:18; Ex. D at 38:9-55:10; Ex. J at 91:25-
4 92:16). Defendants have not provided *any* evidence to show that the manner in which
5 the Defendant Counties apply signature verification prevents fraud. The lack of
6 training, application of meaningful published standards, and minimal efforts to
7 provide fair notice to voters of how their signatures will be compared are relatively
8 easy to remedy. Apparently recognizing they have no argument against these
9 straightforward remedies—most of which are part of other state signature match
10 schemes—Defendants construct a strawman: that Plaintiffs seek to enjoin voter
11 signature matching in its entirety. Defendants have provided no argument or evidence
12 as to why the specific, tailored remedies requested by Plaintiffs are so difficult to
13 implement that, rather than implement them, the racially disparate signature rejection
14 should be tolerated.

15 **Plaintiffs Have Demonstrated Genuine Issues of Disputed Fact Under the**
16 **Totality of Circumstances**

17 Courts may consider “any circumstance that has a logical bearing on whether
18 voting is ‘equally open’ and affords equal ‘opportunity’ may be considered.”
19 *Brnovich*, 141 S.Ct. at 2338. Relevant in that determination are the non-exhaustive
20 “Senate Factors” which include: (1) history of voting-related discrimination; (2)
21 degree of racially polarized voting; (3) presence of voting practices or procedures that
22 subjugated the minority group’s voting preferences; (4) existence of candidate slating;
23 (5) the extent to which the minority group bears the effects of past discrimination in
24 areas that tend to hinder their ability to participate in the political process; (6) the use
25 of subtle or overt racial appeals in political campaigns; (7) the extent to which
26 minority group members have been elected to office; (8) the responsiveness of elected
27

officials to the particularized needs of the minority group; and (9) the tenuousness underlying the challenged voting practice or procedure. *Montes v. City of Yakima*, 40 F. Supp. 3d 1377, 1408 (E.D. Wash. 2014). Senate Factors One and Five are more probative in vote denial cases. *Id.* at 1409, 1413. As set forth below, Plaintiffs have provided sufficient evidence under the totality of the circumstances test that voting is not equally open for Latino voters in Defendant counties. Consequently, summary judgment should be denied.

Senate Factor One: History of Discrimination

The record demonstrates that there is a history of official discrimination in the state of Washington and in Defendant Counties. All evidence of discrimination within the target jurisdiction, including statewide discrimination, is clearly relevant and supports a finding of historic discrimination under Senate Factor One. *See Luna v. Cnty. of Kern*, 291 F. Supp.3d 1088, 1135 (E.D. Cal. 2018) (“Evidence of statewide discrimination is clearly relevant and may provide context for understanding instances of discrimination within the political subdivision at issue.”).

From the 1960s to 1970s, English literacy tests were unequally and unfairly administered to Latinos in the Yakima Valley, with the effect of disenfranchising Latino voters. *See* ECF No. 79-3 at 24-30. Within the past two decades, Yakima County has been subjected to a federal consent decree under Section 203 of the VRA for failing to provide election materials in Spanish (*see U.S. of Am. v. Yakima Cnty.*, CV-04-3072-LRS (E.D. Wash. 2004)); the City of Yakima has been found in violation of Section 2 of the VRA (*Montes*, 40 F. Supp. 3d 1377 (E.D. Wash. 2014)); and Yakima County recently settled a Washington Voting Rights Act (WVRA) lawsuit in which a Washington state court found liability for a violation under the WVRA Act. *See Aguilar v. Yakima Cnty.*, No. 20-2-0018019 (Kittitas Cty. Sup. Ct. July 13, 2020). *See, e.g.*, ECF 79-3 at 10-30 (Plaintiffs’ expert detailing the history of race relations

1 and discrimination in Washington, Eastern Washington, and specifically in Defendant
2 Counties.). Indeed, one federal court has already found a history of voting related
3 discrimination in Yakima County. *See Montes*, 40 F. Supp. 3d 1377, 1409-10 (finding
4 that Yakima County being sued by the federal government for failing to provide
5 Spanish-language voting materials and voter assistance to Spanish-speaking voters
6 and steps taken by Yakima County to remedy related harm weighed in favor of
7 Plaintiffs on Senate Factor One).

8 **Senate Factor Five: Discrimination in Education, Housing, Employment,**
9 **and Healthcare**

10 Evidence in the record shows that Latinos in Defendant Counties experience
11 discrimination in housing, education, employment, and healthcare, among other areas
12 of social life. Importantly, Plaintiffs are not required to establish causation under
13 Senate Factor Five. *See Luna*, 291 F. Supp.3d at 1137 (citing *League of United Latin*
14 *Am. Citizens, Council No. 4434 v. Clements*, 986 F.2d 728, 750 (5th Cir. 1993).
15 According to data from the 2021 United States Census, 34.8%, 31.1%, and 48.4% of
16 Latinos in Benton, Yakima, and Chelan County, respectively, have achieved some
17 high school education, which is significantly less as compared to their Anglo
18 counterparts. ECF No. 97-1 at ¶¶ 44-46. Latinos in all counties also make between
19 \$10,127 to \$28,607 less in median income than Anglos. *Id.* Latinos in Defendant
20 Counties are 18.1%, 22.8%, and 30.9% less likely to be homeowners. *Id.* Further,
21 25.7% of Latinos in Benton, 23.3% of Latinos in Yakima, and 16.9% of Latinos in
22 Chelan counties live under the poverty line. *Id.* Latinos have lower political
23 participation and turnout in Defendant Counties. ECF. No. 79-1 at ¶ 9 (Latinos in
24 Defendant Counties comprising just 9% of ballots cast from 2019-2022). For example,
25 in Yakima County, voters with Spanish surnames had a return rate of 33%, 23%, and
26 23%, respectively, for the County Commissioner District 1, 2, and 3 races compared
27

1 to total turnout rates of 63%, 43% and 36%. Waknin Decl., Ex. P. These socio-
2 economic disparities influence Latino voters' ability to politically participate and
3 ability to cure a challenged ballot, so summary judgment should be denied.

4 **Senate Factors Two, Three, Six, Seven, and Eight Findings**

5 Plaintiffs have provided evidence to support this Court finding that Senate
6 Factors Two, Three, Six, Seven, and Eight exist in Defendant Counties. *See*, e.g., ECF
7 No. 79-1; 79-3. Voting in Defendant Counties is polarized. *See* ECF No. 79-1 at
8 Appendix p27. In elections from 2020, Spanish surname voters in Defendant Counties
9 demonstrate cohesion between 67% and 90% for certain candidates, while non-
10 Spanish surname voters demonstrate cohesion for the *opposite candidates* at levels of
11 66% to 71%. Findings of racially polarized voting, even in vote denial cases, weigh in
12 favor of finding a Section 2 violation. *See Fair Fight Action v. Raffensperger*, Case
13 No. 1:18-CV-5391-SCJ, 2022 WL 4725887, at *92 (N.D. Ga. Sept. 30, 2022).
14 Further, Defendant Counties have used voting procedures such as at-large elections
15 that enhance the opportunity for discrimination against Latinos. *See* ECF No. 79-3 at
16 30-34.

17 Overt and subtle racial appeals have also been made during campaigns for
18 office within Defendant Counties and by some elected officials in South Central and
19 Southeastern Washington. *See* ECF No. 79-3. While running for re-election, past
20 Yakima County Commissioner Ron Anderson shared posts on his Facebook page
21 claiming that "illegals" were stealing elections in 2016. Waknin Decl., Ex. Q. In
22 Chelan County, during the November 2021 Wenatchee School Board election, subtle
23 racial appeals were used against a Spanish-surname candidate. *See* ECF No. 79-3 at
24 36-43. Defendants do not contest that these appeals exist, but instead argue that these
25 types of racial appeals are not the sort that courts look for. *See* ECF No. 120 at 16-17.
26 That assessment, however, goes to the weight of the evidence. *See Fair Fight Action*,

593 F. Supp. at 1343 (finding campaign ads, including one by then-Secretary of State Kemp that stated that he had ‘a big truck ... Just in case I need to round up criminal illegals and take them home myself’ sufficient evidence of racial appeals to carry a summary judgment burden).

Under the totality of the circumstances, the application of the signature verification system by Defendant Counties complements the vestiges of past and current racial discrimination to cause inequality of the electoral opportunities for Hispanic voters. *See Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (*en banc*). The Court should deny summary judgment as to Plaintiffs Section 2 claim.

B. Whether Defendant Counties Acted with Discriminatory Intent in Operating the Signature Verification Systems Presents a Triable Issue of Fact

Discriminatory intent claims, such as those here, are not suited for resolution by summary judgment. *See Village of Arlington Heights v. Metro Housing Dev. Corp.*, 429 U.S. 252, 266-68 (1977); *see also Greater Birmingham Ministries v. Sec’y of State for State of Alab.*, 992 F.3d 1299, 1322 (11th Cir. 2021). This is because courts are required to perform a “sensitive inquiry into such circumstantial and direct evidence of intent as may be available.” *Arlington Heights*, 429 U.S. at 266-68. Nothing in *Arlington Heights* requires proof of direct evidence and other courts have similarly found a showing of intentional discrimination does not require direct evidence. *See Rogers v. Lodge*, 458 U.S. 613 (1982); *Veasey*, 830 F.3d at 231; *see also Johnson v. DeSoto Cnty. Sch. Bd.*, 995 F. Supp. 1440, 1449 (M.D. Fla. 1998). Intentional discrimination can be demonstrated by the continued operation of voting devices to further racial discrimination. *Rogers*, 458 U.S. at 617.

Here, there is evidence of direct discrimination. Voters with both Spanish sounding first names and surnames are more likely than voters with only Spanish surnames to have their ballots rejected. ECF No. 79-1 at ¶¶ 27-28. Despite

1 Defendants' contention that counties "rarely consider the name of a voter in
2 deciphering a signature," ECF No. 120 at 15 (citing Def.'s Statement ¶¶ 54, 64), the
3 names of voters are available and reviewed by CRB members during the signature
4 verification process. Waknin Decl., Ex. C at 143:10-144:4. It is clear from testimony
5 and Plaintiffs' expert literature review that surnames are direct markers of race or
6 ethnicity. ECF. No 79-2 at ¶¶ 31-40. Further, Yakima CRB member Ron Anderson
7 asked election staff for Spanish surname voting statistics and voting precinct statistics
8 with Spanish surname information in Yakima County in relation to voting rights.
9 Waknin Decl., Ex. D at 104:18-22; *see also id.*, Ex. V and Ex. W. CRB members and
10 election staff are obviously aware of the racial and ethnic makeup of voters and use
11 Spanish surnames as a proxy for Latino voters.

12 Further, Defendant Counties continued to apply the signature verification
13 process in the same manner even after being presented with information that there was
14 a racially disparate impact. Waknin Decl., Ex. I at 132:21-145:7; Ex. J at 120:7-21;
15 Ex. R (stating that a news article that finds Latino ballots are more likely to be
16 rejected "fits in with some of the preliminary findings of the State Auditor's audit on
17 signature review--the fact that cultural minorities have a higher chance of getting
18 challenged.").

19 Second, Plaintiffs have circumstantial evidence that is sufficient to support the
20 denial of summary judgment. Under *Arlington Heights*, the factors courts look to are
21 "the impact of the official action," especially "whether it bears more heavily on one
22 race than another," "[d]epartures from the normal procedural sequence,"
23 "[s]ubstantive departures," and "contemporary statements by members of the
24 decision-making body, minutes of its meetings, or reports." *Arlington Heights*, 429
25 U.S. at 266-68. "Discriminatory purpose 'may often be inferred from the totality of
26 the relevant facts, including the fact, if it is true, that the [law] bears more heavily on
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1 one race than another.” *N. Car. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 220
2 (4th Cir. 2016) (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1979)).

3 As detailed in Section 1 and in Plaintiffs’ expert reports, the impact of the
4 application of Defendant Counties’ signature verification processes bears more
5 heavily on Latino voters. *See* ECF No. 79-1. Plaintiffs’ survey results demonstrated
6 that racial bias plays a role in signature verification rejection. ECF No. 79-2. Study
7 respondents rejected Spanish surname signatures 5.5% more than white-coded
8 signatures. *Id.* at ¶¶ 91-92. When variables such as age, sex, education, partisanship,
9 race, and political ideology were controlled for, explicit bias was still a statistically
10 significant predictor of lower Hispanic signature acceptance rates. *Id.* at ¶¶ 103-108.
11 This study demonstrates that bias against Hispanic sounding names influences those
12 who review signatures.³

13 There is also evidence of departures from normal procedures in Defendant
14 Counties. Starting in 2020, Yakima County departed from its normal decade-long
15 practice of Canvassing Review Board members authorizing the final decision-making
16 of ballot rejections. Waknin Decl., Ex. J at 160:16-23. This delegation is an anomaly.
17 Former Yakima County Commissioner even testified that the “determination of the
18 validity of challenged ballots to auditor’s staff” is not something the County can
19 delegate. Waknin Decl., Ex. D at 80:11-15. He admitted the same regarding the
20 CRB’s duty to reject ballots rather than relying on the auditor’s staff. *Id.* at 80:16-23.
21 Plaintiffs have provided both direct and circumstantial evidence to present a genuine
22 dispute of material fact regarding their intentional discrimination claims under the
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24
25 ³ Plaintiffs’ expert further suggested remedies that were found to reduce bias, including
26 having reviewers watch implicit bias training that is already utilized for jurors in the
27 federal court system. ECF No. 79-2 at ¶¶ 114-115.

1 Fourteenth Amendment, and Fifteenth Amendment, and under Section 2 of the Voting
2 Rights Act, so the Court should accordingly deny Defendants' motion.

3 **C. Plaintiffs' Equal Protection Claims Present a Trial Issue of Fact**

4 When analyzing the constitutionality of a restriction on the right to vote, courts
5 "weigh 'the character and magnitude of the asserted injury to the rights protected by
6 the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the
7 precise interests put forward by the State as justification for the burden imposed by its
8 rule,' taking into consideration 'the extent to which those interests make it necessary
9 to burden the plaintiff's rights.'" *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)
10 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). When a burden on the
11 right to vote is severe or discriminatory, the regulation must be "narrowly drawn to
12 advance a state interest of compelling importance." *Burdick*, 504 U.S. at 434 (quoting
13 *Norman v. Reed*, 502 U.S. 279, 289 (1992)).

14 Plaintiffs have demonstrated a clear record that the restriction on the right to
15 vote severely burdens Latino voters. ECF No. 79-1; *supra*, Section 1. Defendants
16 cannot say that the burden on the Plaintiffs' right to vote is indisputably reasonable or
17 slight just because "signing a ballot declaration properly" is a "usual" burden. ECF
18 No. 120 at 23–24. This is because the challenged issue here is the *application* of
19 Defendant Counties' conduct, not the requirement of signing a ballot. Here, Plaintiffs
20 *have* signed their ballot properly and returned their ballot properly. Defendants'
21 actions, after the ballot has been cast, place the burden on Plaintiffs and Latino voters,
22 not those voters' own actions. While all election laws have an impact on the right to
23 vote, *Weber v. Shelly*, 347 F.3d 1101, 1106 (9th Cir. 2003), the application of the
24 election laws in this case have a severe and intolerable impact on Latino voters.

25 Defendants have not provided any justification sufficient to support the burden
26 their conduct places on Plaintiffs' rights. The best Defendants do is to claim, without
27

evidence, that the Defendant Counties’ processes further the state’s interest in preventing voter fraud. Defendants have not provided “evidence that signature matching ensures voters vote their own ballots.” ECF No. 120 at 24. But even if they had, Washington law expressly allows the acceptance of ballots from voters who signed the ballot of another registered voter. W.A.C. 434-261-050(5). “This Court must evaluate ‘the extent to which [Defendants’] justifications *require* the burden to plaintiffs’ rights.’ *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1318 (11th Cir. 2019) (alterations added) (emphasis added). *See also Anderson*, 460 U.S. at 789, 103 S.Ct. 1564 (explaining that “the Court must not only determine the legitimacy and strength of each of [the state’s] interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff’s rights”) (alterations added). This inquiry “emphasizes the relevance of context and specific circumstances.” *Cowen v. Ga. Sec’y of State*, 960 F.3d 1339, 1346 (11th Cir. 2020). There is no plausible claim that the interest of reducing voter fraud *requires* Defendant Counties to reject the ballots of Latino voters at a rate approximately 4 times higher than the rejection rate of non-Latino ballots. Defendants’ motion also fails on this issue.

D. Plaintiffs’ Procedural Due Process Claim Presents a Triable Issue of Fact

There are triable issues of fact regarding whether Defendants Counties’ application of Washington’s signature matching regulations have violated Plaintiffs’ procedural due process rights. The right to vote is a fundamental liberty or property interest protected by the procedural guarantees of the Fourteenth Amendment. *See Reynolds v. Sims*, 377 U.S. 533, 560 (1964); *Lemons v. Bradbury*, 538 F.3d 1098, 1102 (9th Cir. 2008); *see Mecinas v. Hobbs*, 30 F.4th 890, 904 (9th Cir. 2022); *Short v. Brown*, 893 F.3d 671, 676 (9th Cir. 2018).

1 In the context of voting rights, Courts have evaluated procedural due process
2 claims under the test articulated in *Mathews v. Eldridge*, 424 U.S. 319 (1976), or the
3 standards of *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and *Burdick v. Takushi*, 504
4 U.S. 428 (1992) (*Anderson-Burdick*). Regardless of whether this Court weighs the
5 importance of the liberty interest at stake and risk of its erroneous deprivation against
6 the government's interest, *see Mathews*, 424 U.S. at 335, or looks to the "character
7 and magnitude" of the burden on the right to vote in light of the government's
8 proffered justification, *see Anderson*, 460 U.S. at 789, the dispositive issues of fact
9 will be the same. "The touchstone of due process is protection of the individual
10 against arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558
11 (1974). The record here demonstrates that Defendants' application of the signature
12 verification process has arbitrarily deprived Plaintiffs and other Latino voters of their
13 right to vote.

14 The crux of Plaintiffs' procedural due process claim is that the state's signature
15 matching regulations are unconstitutionally "standardless" *as applied by Defendants*.
16 ECF No. 49 at ¶¶ 204-206. Signature verification standards are not being uniformly
17 applied or followed in Defendant Counties. Members of the CRBs who are actively
18 reviewing ballots in elections may have not received any training in signature
19 verification, scant training, or training 20 years prior to serving on the CRB. *See*
20 Waknin Decl., Ex. A at 5-8 (Benton County Resp.), at 5-7 (Chelan County Resp.), at
21 5-7 (Yakima County Resp.) (indicating that there are no records relevant to signature
22 verification training for many CRB members and alternates in Defendant Counties);
23 Ex. B at 60:5-64:11, 77:15-79:18; Ex. D at 38:9-55:10.

24 Some CRB members, despite serving on multiple canvassing boards, can
25 neither articulate the standards for review of a voter's signature nor identify whether
26 there are laws generally that govern their conduct in reviewing signatures. Waknin
27

1 Decl., Ex. C at 77:8-78:25. Former Yakima County Commissioner and CRB member
2 Ron Anderson could not even remember the training he received supposedly three
3 times. Waknin Decl., Ex. D at 49:22-50:8 (failing to recall the training or whether he
4 applied the ACE-V method to signature verification). Instead, he testified that he
5 could rely upon his training and familiarity with signatures from his real estate career.
6 *Id.* at 54:10-24. Additionally, Defendant Counties do not require CRB members to
7 attend training in signature verification, despite having the power to require such
8 training. *See* Waknin Decl., Ex. E. In some instances, election officials in Defendant
9 Counties have told members of the CRB that they do not need to attend signature
10 verification training. Waknin Decl., Ex. S at 2. There are genuine issues of fact for this
11 Court to resolve at trial as to whether those in charge of verifying signatures are
12 adequately trained, and thus whether there is a violation of procedural due process.

13 The lack of training of signature reviewers is also paired with a lack of
14 articulable standards for implementing the appropriate signature verification process
15 codes. None of the Defendant Counties provides written instructions to reviewers on
16 how to interpret the signature verification provision. Waknin Decl., Ex. I at 65:13-21.
17 Defendant Counties do not provide written instructions on the formal processes that
18 signature verifiers must use for signature verification. *Id.* at 101:9-102:11; Ex. J at
19 183:16-21 (citing no checklist, just the guidelines in the WAC and WSP training).
20 There is no record in Benton County of how many characteristics or “clusters” CRB
21 members and election staff must determine are similar for a specific signature to
22 qualify as a match. Waknin Decl., Ex. I at 164:10-14. Some Defendant Counties have
23 no overview process to ensure that reviewers follow the Counties’ own signature
24 verification standards. *Id.* at 37:11-38:21, 39:25-40:21, 101:9-14.

25 There is also sufficient evidence for a reasonable factfinder to conclude that
26 Defendants’ signature matching processes do not provide a consistent notice and cure
27

1 procedure. Defendants admit that there is no uniformity concerning when they send
 2 cure notices as part of the review process. *Compare* ECF 121 ¶¶ 80–81 (discussing
 3 how Benton and Yakima Counties send cure notices after signatures are initially
 4 determined to be mismatches), *with id.* ¶ 82 (“Chelan County sometimes sends cure
 5 notices immediately following the first level of review and sometimes after the
 6 supervisory review.”). This lack of clear standards and consistent procedures
 7 manifests in the arbitrary disenfranchisement of Latino voters, even after those voters
 8 attempt to cure their ballots in person before their county CRB. *See* Waknin Decl., Ex.
 9 T at ¶¶ 8, 11-12; Ex. U at ¶ 24; Ex. G at ¶¶ 2-3; Ex. H at ¶ 2.

10 There is sufficient evidence that Defendant Counties fail to provide any clear
 11 standard to determine what counts as a “proper” signature, fail to ensure that
 12 reviewers are trained in signature verification, lack any compliance review measures,
 13 and lack standards for when voters are notified to cure their ballots. The evidence of a
 14 severe or unreasonable burden is thus measurable not by the “consequence[s] of
 15 noncompliance,” *Ariz. Democratic Party*, 18 F.4th at 1188, but by the fact that voters
 16 *attempting to comply* with Washington law lack any means of determining how to do
 17 so. Ascertaining the extent of the consequent burden on Plaintiffs’ right to vote is a
 18 fact-intensive inquiry fit for trial. *See Saucedo v. Gardner*, 335 F. Supp. 3d 202, 222
 19 (D.N.H. 2018) (finding that the process of determining signature mismatch violated
 20 due process due to election staff having unreviewable discretion to reject ballots, the
 21 natural variations of a voter’s signature combined with a lack of training and
 22 functional standards, and lack of review process). The Court should accordingly deny
 23 Defendants’ motion.

24 V. CONCLUSION

25 The law does not require minority voters to accept disenfranchisement because
 26 only small numbers of them are denied the right to vote. Indeed, “[s]etting aside the
 27

1 basic truth that even one disenfranchised voter—let alone several thousand—is too
 2 many, what matters for purposes of Section 2 is not how many minority voters are
 3 being denied equal electoral opportunities but simply that ‘any’ minority voter is
 4 being denied equal electoral opportunities.” *League of Women Voters of N.C. v. State*
 5 *of N.C.*, 769 F.3d 224, 244 (4th Cir. 2014). As shown above, there is a material
 6 dispute of fact as to whether minority voters are being denied equal opportunities to
 7 vote under Section 2 of the VRA and the First, Fourteenth, and Fifteenth
 8 Amendments. Defendants’ assertions that the Counties are acting in good faith when
 9 their actions lead to disenfranchisement of Plaintiffs and Latino voters is a
 10 determination for this Court to make after a full trial on the merits, not on summary
 11 judgment. For all of these reasons, the Court should deny Defendants’ Motion for
 12 Summary Judgment.

13
 14
 15 Dated: June 30, 2023

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CERTIFICATE OF SERVICE

I, Molly Matter, hereby certify under penalty of perjury of the laws of the State of Washington that on June 30, 2023, I electronically filed the foregoing **PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** with the Clerk of the Court using the CM/ECF System, which in turn automatically generated a Notice of Electronic Filing (NEF) to all parties in the case who are registered users of the CM/ECF system as follows:

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